IN THE

OCTOBER TERM, 1971

GEORGE A. ANGLE, d/b/a KANSAS REFINED
HELIUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A22) is reported at 445 F. 2d 237. The decisions and orders of the Board (Pet. App. A22-A166), which were consolidated for purposes of this proceeding, are reported at 176 NLRB Nos. 115 and 116.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on September 10, 1971. The petition for a writ of certiorari was filed on October

29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the company's "senior operators" were employees rather than supervisors, and thus protected by the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2-3. Section 8(a)(1) is also relevant, and provides:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; • • •

STATEMENT

In mid-June 1966, the Oil, Chemical and Atomic Workers Union began an organizing campaign at the plant of the Kansas Refined Helium Company, located in Otis, Kansas, and owned by George Angle.[1] The Union obtained signed authorization cards from 18 of the 22 production and maintenance personnel;

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[1] The plant had recently been constructed for Angle by American Messer Corporation, which had hired and trained the personnel to run it (Pet. App. A30).

Angle, when notified of this, asked for a Board election (Pet. App. A31-A32).

During the months before the scheduled election, the Company, through Angle, engaged in extensive activities which the Board found were unfair labor practices, in violation of Section 8(a)(1), (3), (4), and (5) of the Act (Pet. App. A24, A78, A120-A121, A138-A139, A161-A162). As a remedy for these unfair labor practices, the Board, *inter alia*, ordered the Company to bargain with the Union upon request (Pet. App. A24, n. 4, A119-A120, A122). The court below held that the Board's unfair labor practice findings were supported by substantial evidence and that the remedial measures ordered were appropriate (Pet. App. A5-A6, A16-A22). The petition does not challenge most of the court's decision; the only claim is that the Company's "senior operators" were "supervisors" as defined in Section 2(11) of the Act, and not, as the Board found and the court below sustained, "employees" protected by the Act.

The facts relative to this issue are not disputed and may be summarized as follows. The plant is supervised by the plant manager (Plant Manager Owens), the operations and engineering manager (Plant Engineer Tyler), and the chief of maintenance (Maintenance Manager Stiff). It employs approximately 24 persons, consisting of "instrument men" (who repair and maintain the gauges and similar devices), general maintenance employees, an electrician, a clerk, and operating personnel. The operating employees monitor the various gauges and take the necessary steps to assure that the automatic process follows its

assigned course; they are classified either as "senior operators" (of whom there are four) or as "junior operators," and the only issue here is the status of the former. (Pet. App. A31, A39.)

Each shift consists of one senior operator and two or three junior operators. The senior operator's principal duty station is at a large bank of indicators (called "the board") in the main control room at the principal building. The junior operators move about the plant area, covering the machines and controls in the outbuildings and on the pipelines between the various tanks and buildings. It is not unusual, however, for a junior operator to take the senior's place at the board for intervals during a shift. (Pet. App. A38; R. 34, 48-49.[2]) All operators have standing instructions, through a manual called the "blue book," to perform certain duties with respect to particular machines during every shift.

Additional instructions for performing tasks made necessary by unusual circumstances are set forth in a "special orders book" prepared by top management. Senior and junior operators consult the special orders book at the commencement of each shift for their assignments during their shift. (Pet. App. A40; R. 31-32, 76, 138-139.) At the end of the shift, the senior operator usually consults this book again to make certain that all assignments have been completed. If his inspection of the book and, possibly, of the machinery, discloses that an assignment to be performed by a junior operator has not been carried

[2] "R." references are to the appendix in the court of appeals.

out, he notifies the appropriate junior operator. (Pet. App. A40-A41; R. 49-50, 52, 54.)

During the regular daytime hours—8 a.m. to 4 p.m., Monday through Friday—the operating crew on that shift and the other plant employees (supervisory, maintenance, and clerical) are on duty. From 4 p.m. each day until 8 the next morning and during weekends, only the operating crew on those shifts normally is at the plant. (Pet. App. A40; R. 35.) Plant Manager Owens, Plant Engineer Tyler, and Maintenance Manager Stiff all reside in the vicinity, however, and, if any unusual problem arises during the night or weekend, the senior operator informs Tyler, who gives the necessary direction, sends down a maintenance man, or comes to the plant himself (Pet. App. A41; R. 36, 48, 50, 136-137). It is not unusual for Tyler or Owens to spend many hours at the plant during nights and weekends, either because they elect to do so or because operating problems or outside emergencies, such as storms, require it (Pet. App. A41; R. 74-75, 136).

Plant Engineer Tyler testified that the senior operators had no authority to discipline junior operators. This was illustrated by an incident during the spring of 1966, involving senior operator Sims and a junior operator named Stahlman. The junior operator had refused to perform a task falling within the regular scope of his duties and Sims reported the matter to Tyler. After giving it some thought and consulting with other officials, Tyler informed the senior operators that they had no disciplinary powers over the juniors and that, if a situation should arise involving

the possible need for disciplinary action, they were to call him and he would take the necessary action. (Pet. App. A41-A42; R. 47, 49, 135.)

On these facts, the Board rejected the Company's contention that the senior operators were supervisors. It adopted the Trial Examiner's decision (Pet. App. A24), thus affirming his finding that the senior operators were, "at most, leadmen and * * * not supervisors" (Pet. App. A50). The Examiner explained this finding as follows (Pet. App. A49-A50):

> The outstanding characteristic of the operation of this plant is that each operator in it, senior and junior alike, had and performed specific, preassigned tasks to keep it running. Practically all of the so-called directions by senior operators to juniors consisted of (i) calling the junior's attention to functions he was required to perform and which he had neglected to perform by reason of oversight or inability to see the indicator calling for its performance, (ii) on the basis of greater experience, advising the junior how to perform one of his assigned tasks, or (iii) cooperating with the junior in the performance of a task that required joint performance.[3]

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[3] The Examiner also found that the 80-85 cents per hour pay differential between the senior and junior operators was due to the superior skill of the senior operators (Pet. App. A43-A44; R. 135, 140); that the senior operators had no power effectively to recommend wage increases (Pet. App. A42-A43; R. 72-73, 110); and that, although senior operators did sign the time cards of junior operators, the cards were not valid until they had also been signed by Plant Engineer Tyler (Pet. App. A45; R. 75, 137). The Company's contention that intra-plant notices granted supervisory authority to the

The court of appeals sustained the Board's findings and enforced its order (Pet. App. A4-A21). It stated that "we find substantial evidence to support the finding that the senior operators were not supervisory personnel within the contemplation of the statute but were merely 'lead men' among the operating employees on each shift" (Pet. App. A15).

ARGUMENT

The record in this case does not present the question stated in the petition (Pet. 2)—whether "an employer [who] has shown a grant of supervisory authority by uncontradicted documentary proof, must * * * assume the further burden of showing tangible examples of the exercise of such authority in order to prove that [it] actually exists." For the premise is missing, since the Examiner concluded that the Company's "documentary proof" did not show that the senior operators had supervisory powers and it was inconsistent with their actual duties (see n. 3 *supra*). The Board adopted this finding, and the court of ap-

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senior operators was rejected; the Examiner pointed out that, of the seven notices, four were "purely conclusionary * * * [with] no factual recital of any of the functions of [the senior operators]" (Pet. App. A46; R. 481, 482, 483, 484); one granted authority to initial, but not to validate, time cards (Pet. App. A46-A47; R. 482); one simply listed the telephone numbers where instrument men could be reached when none was on duty at the plant (Pet. App. A47; R. 486); and the last merely added to the assigned duties of all operators, both senior and junior (Pet. App. A47; R. 485). Finally, the Examiner found that "the senior operators themselves do not appear to have been under the impression that they were supervisors * * *." (Pet. App. A47).

peals held that substantial evidence supported it (Pet. App. A13-A15).

In this circumstance, there is no basis for petitioner's contention (Pet. 8-13) that the court below departed from the principle applied by other courts of appeals—*i.e.*, that it is the existence of supervisory power, and not the frequency of its exercise, which determines supervisory status under Section 2(11) of the Act. *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C.A. 1); *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385, 386, 388 (C.A. 6). Indeed, the court below explicitly recognized the general validity of this principle, and concluded that the decision here fully comports with it (Pet. App. A14-A15).

On the record here, then, the only issue is whether substantial evidence supports the finding that the senior operators did not possess actual supervisory authority. The court below carefully canvassed the factual setting and correctly concluded that substantial evidence supported that finding. In any event the issue, turning as it does on the particular facts presented, does not warrant further review.[4]

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[4] There is no conflict between the decision of the court below and that of the Tenth Circuit in *Angle* v. *Sacks*, 382 F. 2d 655, affirming, with modification, the interim injunction issued by the district court in connection with the dispute here under Section 10(j) of the Act, 29 U.S.C. 160(j). To be sure, the Tenth Circuit excepted senior operators Rodgers and Sims from the district court's reinstatement order, noting that the Board's Regional Director had ruled that they were supervisors and not eligible to vote in the representation election which he had directed. However, the Tenth Circuit

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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did not approve the Director's decision, but merely concluded that, since the Board had later directed that these senior operators be allowed to vote subject to challenge, the "temporary reinstatement of Sims and Rodgers is not necessary to protect the efficacy of a final order by the Board regarding the status of senior operators. * * *" 382 F. 2d at 661.

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